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26 U.S.C. §401

§401. Qualified pension, profit-sharing, and stock bonus plans

(a) Requirements for qualification.–A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section–

(1) if contributions are made to the trust by such employer or employees, or both . . . for the purpose of distributing to such employees or their beneficiaries the corpus and income of the fund accumulated by the trust in accordance with such plan;

* * *

. . . . . .

26 U.S.C. §404

§404. Deduction for contributions of an employer to an employees' trust or annuity plan and compensation under a deferred -payment plan

(a) General rule.–If contributions are paid by an employer to or under a stock bonus, pension, profit-sharing, or annuity plan . . .such contributions . . . shall not be deductible under this chapter; but, if they would otherwise be deductible, they shall be deductible under this section, subject, however, to the following limitations as to the amounts deductible in any year:

(1) Pension trust.--

(A) In general.–In the taxable year when paid, if the contributions are paid into a pension trust . . . in an amount determined as follows:

* * *

SA-2

Frank J. Crosby
HC 74, Box 250
Millinocket, ME 04462
(207) 723-8445

11/1/2000

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Bowater Incorporated
Attn: Pension Plan Administrator/Aaron Whitlock
55 East Camperdown Way
Greenville, SC 29602

Reference: Bowater Incorporated Retirement Plan for Salaried Employees of Great Northern Paper, Inc.

Subject: Appeal of Plan Lump Sum Distribution Calculation

Mr. Whitlock:

This is an appeal of the plan's lump sum distribution calculation. This appeal is being made per paragraph 2.10 of the plan (as amended and restated August 13. 1999) which provides for a written response to this appeal within ninety days from your receipt of this appeal.

Plan participants have received notice that we are eligible to take lump sum distributions from the plan beginning January 1, 2001. Your notice, dated October 3, 2000, supplied an estimated lump sum distribution value for January 1, 2001. The lump sum amount was described during the October 19 participant review meeting you attended as being simply the current value of a participant's hypothetical cash balance plan account projected out using an assumed November 2000 interest credit rate of 5.72%.

This is not the lump sum calculation method required by the Internal Revenue Service as defined in their determination letter 96-8 and as reaffirmed by the recent federal appeal court decisions in Lyon vs. Georgia Pacific and Esden vs. Bank of Boston. The IRS position is further explained in Government Accounting Office report HEHS-00-185 titled "Implications of Conversions to Cash Balance Plans" issued in September 2000.

Footnote 21 on page 18 of the GAO report describes the cash balance plan lump sum distribution calculation method required by law as follows:

> "In a calculation of the actual benefit, the hypothetical account balance is projected forward with interest earning to the plan-specified normal retirement age.
>
> Next, the projected balance is converted into a normal retirement age annuity, using the plan-specified discount rate and mortality assumptions.
>
> Finally, the value of the annuity is discounted back to current dollars, using the assumptions for mortality and interest specified by federal regulations, to convert the normal retirement age annuity into an actuarially equivalent lump sum in current dollars."

Examples of the required calculations are included in IRS 96-8 and in Figures 7 & 8 of the GAO study.

Attachment 1 shows my approximation of the correct lump sum calculation following IRS 96-8 methods. This indicates that I am entitled to an additional 12.3% versus Bowater's supplied January 1, 2001 lump sum distribution. Interim

calculations are shown and assumptions are documented. Please be aware it is extremely difficult for an employee to get the proper data to make this calculation, therefore, my assumptions, calculations and final results should be considered approximations.

I request that you recalculate my lump sum distribution according to the 96-8 and explain it to me by documenting the appropriate assumptions and interim calculations in column C of Attachment 1. Please assume a January 1, 2001 distribution using interest rates and mortality assumption per plan as amended August 13, 1999.

I am also concerned about the impact of the August 13, 1999 amendment on my lump sum calculation as the included interest rate and mortality assumption changes might have the effect of lower lump sum distributions after implementation of the plan amendment. ERISA prevents my accrued benefit from being reduced due to a plan amendment change. Please also fill out column E of Attachment 1 assuming a January 1, 2001 distribution using the interest rate and mortality assumptions per the terms of the plan prior to the August 13, 1999 plan amendment.

As an employee, it is very difficult to perform these calculations without access to life expectancy tables for the plan mortality tables. My understanding is that our plan used the UP1984 adjusted -1 for males and +4 for females prior to the latest amendment and the 1971 Group Annuity Table blended 80% male/20% female. Please provide life expectancy tables for these two mortality assumptions from age 20 to the final table ages. I would appreciate your providing this information as soon as possible so that I can refine my conclusions.

Thank you for your prompt attention to this matter.

Sincerely,

/s/Frank J. Crosby
Frank J. Crosby

. . . . . .

BOWATER INCORPORATED
55 East Camperdown Way
Post Office Box 1028
Greenville, SC 29602-1028

BOWATER 864/271-7733

February 12, 2001

Mr. Frank J. Crosby
HC 74, Box 250
Millinocket, Maine 04462

Re: Claim for Benefits under Bowater Incorporated Retirement Plan for Salaried Employees of Great Northern Paper, Inc. (the "Plan")

Dear Mr. Crosby:

We received your letter concerning the calculation of your lump sum benefit under the Plan on November 13, 2000. Although you styled your correspondence as "an appeal of the Plan's lump sum distribution calculation," we are treating it as a claim for benefits under Section 2.10 of the Plan, because no formal claim decision has been issued by the Plan Administrator with respect to the issues you raised. As such, you will have an opportunity to appeal this decision if you disagree with it.

In your letter, you requested that your lump sum distribution from the Plan be calculated under the so-called "whipsaw" method. Your request has been granted, as more fully discussed below.

You also requested certain information regarding the impact of changes made by the August 1999 amendment and

restatement of the Plan. Note in this regard, however, that no changes to the manner in which lump sum distributions are calculated were made in the August 1999 amendment and restatement of the Plan. The changes to which you refer were those made by the amendment and restatement that was effective January 1, 1997 (which will be referred to herein as the "Restatement"). We have used the pre-Restatement factors in the calculations described below, thus protecting your benefit from the effect of certain changes that were to be effective as of January 1, 2000.

History

The Plan is a cash balance plan and was adopted by Great Northern Paper, Inc. effective January 1, 1992. At that time, GNP was a wholly owned subsidiary of Bowater Incorporated. GNP had acquired certain assets from Great Northern Nekoosa. The Plan was established to accept a transfer of assets and liabilities from a plan of Great Northern Nekoosa's parent corporation (Georgia Pacific) with regard to the benefits of Great Northern Nekoosa employees associated with the assets that had been purchased by GNP. Effective August 13, 1999, Bowater Incorporated became the Plan sponsor. On August 17, 1999, Bowater Incorporated sold all of the stock of GNP to Inexcon, thereby terminating the employment of Plan participants by the Plan sponsor.

Introduction

As you know, the method of calculating lump sum distributions in cash balance plans is currently the subject of ongoing litigation and is not entirely clear. The Restatement was submitted to the Internal Revenue Service in 1998, and the IRS requested specific changes relating to the lump sum calculation, which are reflected in the Restatement provisions with which you have taken issue. Subsequent litigation (the Lyons and Esden cases) calls into question the IRS-approved methods used by the Restatement.

Despite the IRS approval, the Administrator has considered your claim in light of its duties under ERISA and the Plan. As a result, your claim has been granted and your benefit has been recalculated as described below.[1]

Discussion

1. *Decision on Claim*

As indicated above, when the Plan was most recently submitted to the Internal Revenue Service for a determination that its terms satisfied applicable provisions of the Internal Revenue Code of 1986 (the "Code"), the IRS specifically addressed the manner in which lump sums were calculated. The IRS approved the method providing for payment of a lump sum equal to an individual's Personal Account, on the condition that (1) the Periodic Adjustment Percentage was changed as of January 1, 2000, (2) the factor used to convert the Personal Account to the increasing life annuity was changed as of January 1, 2000, and (3) the whipsaw method was used to calculate lump sums paid between July 1, 1999 and December 31, 1999.

In light of the current status of the Lyons and Esden cases, and the Plan Administrator's duty under Section 13.1 to apply the Plan in a manner satisfying the Code's qualification requirements, the Plan Administrator has determined that your lump sum distribution will be calculated as follows:

---

[1] This decision should be read together with Exhibit A -- Plan Sections Applied and Exhibit B - Calculations, attached hereto.

A. Your Personal Account will be projected forward to your Normal Retirement Date at the "Periodic Adjustment Percentage." (This step corresponds to section I in your spreadsheet.) Under Section 6.5 of the Restatement, the Periodic Adjustment Percentage was changed effective January 1, 2000. However, your Personal Account as of December 31, 1999, was also projected forward to your Normal Retirement Date at the Periodic Adjustment Percentage as determined under the pre-Restatement definition. In your case, the post-Restatement definition produces a Periodic Adjustment Percentage of 0.48% per month and the pre-Restatement definition produces a Periodic Adjustment Percentage of 0.44% per month for 2000 and 0.50% per month thereafter. The Periodic Adjustment Percentage for your lump sum calculation will be 0.44% per month for 2000 and 0.50% per month thereafter, since the pre-Restatement definition produces a larger result.

B. The projected amount is converted to an annuity. (This step corresponds to section II in your spreadsheet.) The question that the Plan Administrator has considered is what form of annuity to use. This calculation can either be based on the Normal Annuity form or the annuity that is the basis of the Accrued Benefit under the Plan. For this purpose, the Plan Administrator has used the Accrued Benefit form (an increasing life annuity), which produces the larger result. The factors used for converting the Personal Account to an increasing annuity were changed effective January 1, 2000. The initial amount of the pre-Restatement increasing monthly annuity is

determined by dividing the Personal Account at Normal Retirement Age by 210. This annuity would then increase by the pre-Restatement Periodic Adjustment Percentage of 0.50%. The initial amount of the post-Restatement increasing monthly annuity is determined by dividing the Personal Account at Normal Retirement Age by 225. This annuity would then increase by the post-Restatement Periodic Adjustment Percentage of 0.48%. The pre-Restatement factors were used for your calculation because they result in a larger amount.

C. The final step in the analysis (corresponding with section III in your spreadsheet) is to determine the present value of the annuity form. The interest rate used for this purpose is the "applicable interest rate," 5.78%, and the mortality table is the "applicable mortality table" described in Appendix A Section D(2)(I) and (ii) of the Plan. The use of these factors is required under Section 417(e) of the Code. As you requested, a copy of this mortality table has been provided with this letter. The resulting lump sum is $52,013.90 as of January 1, 2001.

The above calculations are further detailed on Exhibit B. A document package is also enclosed that describes your distribution options.

2. *Information Requests*

I believe that the above disposition of your claim addresses your questions concerning the impact of the Restatement. By using the pre-Restatement factors in the calculations described above, the Plan Administrator has protected your benefit from the effect of the changes in the Periodic Adjustment Percentage and annuity conversion factor that were to apply January 1, 2000.

Appeal Procedure

Although your claim has been granted, if you disagree with the calculations used in this decision, you may request an appeal of this decision in accordance with Section 2.10 of the Plan. That Section provides an appeal procedure, as summarized below, for reviewing decisions on claims for benefits.

To file an appeal, you must submit a written request of appeal to the Plan Administrator within 60 days after receipt of this letter. You may review pertinent documents, and submit points of disagreement and other comments in writing.

The Plan Administrator shall, within 60 days of the receipt of a written request for appeal, either allow or deny your appeal under the Plan in writing. However, the Plan Administrator may notify you in writing within the initial 60-day period that special circumstances require an additional 60-day extension of time for processing your appeal. If your appeal is denied, the Plan Administrator or its designee's written denial will set forth the specific reasons for denial and the specific references to the pertinent Plan provisions on which the denial is based.

If you wish to appeal the above decision, you may write to:

Pension Administration Committee
Bowater Incorporated
Attn: Carol D. Hinton, Secretary
55 East Camperdown Way
P.O. Box 1028
Greenville, SC 29602

Very truly yours,

BOWATER INCORPORATED RETIREMENT PLAN FOR SALARIED EMPLOYEES OF GREAT NORTHERN PAPER, INC.

BOWATER INCORPORATED
Plan Administrator

By/s/ Aaron B. Whitlock
Aaron B. Whitlock, Director of Compensation and Benefits

Enclosures

EXHIBIT A -
Plan Sections Applied

Plan Sections Applied

Section 1.1 "Accrued Benefit" shall mean as of the time of reference, a monthly amount of benefit, payable in the form of an increasing life Annuity, commencing on a Participant's Normal Retirement Date, which increasing life Annuity is the result of dividing the then current value of such Participant's Personal Account by the applicable factor from Section A of Appendix A.

Section 1.2 "Actuarial Equivalent" shall mean with respect to any specified Annuity or benefit, another Annuity or benefit which commences at a different date and/or is payable in a different form than the specified Annuity or benefit, but which has the same present value as the specified Annuity or benefit, when measured on the basis of the interest rate, mortality table or other factors, if any, which are applicable to such other Annuity or benefit, and are specified in Section D of Appendix A as in effect at the date of commencement of such other Annuity or benefit.

Section 1.39 "Periodic Adjustment Percentage" shall mean the rate of increase used to calculate the periodic adjustments to a Participant's Personal Account as determined in accordance with the provisions of [6.5, providing for a rate through December 31, 1999, of the Pension Benefit Guaranty Corporation's immediate annuity rate plus 75 basis points, and a rate thereafter of the "applicable interest rate," described below].

Section A of Appendix A: Factors To Convert To Increasing Life Annuity

The monthly amount of a Participant's increasing annuity shall equal the credits in the Participant's Personal Account as

of his Benefit Commencement Date divided by the applicable annuity value (as defined below), based on the Participant's age as of his Benefit Commencement Date.

If the Benefit Commencement Date is the first of the month following the Participant's sixty-fifth (65^{th}) birthday, the applicable annuity value is 210. Otherwise, the applicable annuity value is 210 plus (or minus) 0.50 for each month that the Benefit Commencement Date is before (or after) the first of the month following the Participant's sixty-fifth (65^{th}) birthday.

Notwithstanding the foregoing, for Benefit Commencement Dates on or after January 1, 2000, the applicable annuity value is 225 plus (or minus) 0.85 for each month that the Benefit Commencement Date is before (or after) the first of the month following the Participant's sixty-fifth (65^{th}) birthday. The factors will change to reflect the life expectancy based on "applicable mortality table" each time that table is changed for purposes of Section D(2) below.

Appendix A Section D(2) Actuarial Equivalence [with respect to lump sum]

Notwithstanding the foregoing, the "applicable interest rate" and the "applicable mortality table" shall be used to calculate any lump sum distribution from the Plan on or after January 1, 2000; provided, however, that any Participant who terminates employment on or after July 1, 1999 but before January 1, 2000, the lump sum Actuarial Equivalent will be the greater of (I) such Participant's Personal Account, or (ii) such Participant's Personal Account projected to Normal Retirement Age using the Periodic Adjustment Percentage as in effect prior to January 1, 2000 discounted back to such Participant's current age using the "applicable interest rate" and the "applicable mortality table." For this purpose, the following definitions shall apply:

(i) The "applicable interest rate" means the annual rate of interest on 30-year Treasury Securities for the look back month (or, in the case of a Participant described in Section 1.58(f)(i)(B) if lower, four and a half (4 ½).

(ii) The "applicable mortality table" is the mortality table based on the prevailing standard table described in Section 807(d)(5)(A) of the Code for determining reserves for group annuity contracts issued on the date as of which the Actuarial equivalent is being determined, as set forth by the Internal Revenue Service.

(iii) The "look back month" used to determine the applicable interest rate is the second calendar month preceding the stability period.

(iv) The "stability period" is the Plan Year.

Section 13.1 [second sentence] However, it is the intention of the Company that this Plan shall always be a retirement plan qualified under Code Section 401, *et. seq.*, and this Plan shall be interpreted and administered accordingly.

EXHIBIT B - Calculations

[Except for the heading, this page was blank.]

Bowater Incorporated Retirement Plan for Salaried Employees of Great Northern Paper, Inc.
Example for SERP Lump Sum Calculation - Frank J. Crosby

	Pre-Restatement	Post-Restatement
12/31/1999 Personal Account Balance	$ 45,846.29	$ 45,846.29
2000 Plan Year Periodic Adjustment Percentage (PAP) per month:		
PBGC Basis	0.44%	N/A
GATT Basis	N/A	0.51%
2001 PAP per month (also used to project for years after 2001):		
PBGC Basis[1]	0.50%	N/A
GATT Basis[2]	N/A	0.48%
Age on 12/31/99	42.9167	42.9167
Projected Personal Account Balance at Age 65	$170,706.67	$ 163,666.85

Greater of Pre-Restatement and Post-Restatement Projected Personal Account Balance	$170,706.67	$ 170,706.67
Increasing Single Life Annuity Equivalent Based on:		
Mortality	71GAT	83GATT
Percent Male	80%	50%
Annuity Factor	210	225
Monthly Periodic Adjustment Percentage	0.50%	0.48%
Age 65 Increasing Single Life Annuity	$ 812.89	$ 758.70
Lump Sum Factor Based on:		
Mortality	83GATT	83GATT
Percent Male	50%	50%
Interest	5.78%	5.78%
Annuity Factor	230.3286	224.4404
Age 65 Lump Sum Value	$187,231.82	$ 170,282.93
Interest Discount Factor to 1/1/2001 at GATT rate	0.30584	0.30584
Mortality Discount Factor to 1/1/2001 at 83GATT	0.90833	0.90833
417(e) Lump Sum on 1/1/2001	$ 52,013.90	$ 47,305.42

Personal Account Balance on 1/1/2001	$ 48,732.14	$ 48,732.14
Final Lump Sum on 1/1/2001		$ 3,281.76
2001 "applicable rate" per month		0.48%
Interest Accumulation Factor to 5/1/2001		1.01934
Lump Sum Payable on 5/1/2001		$ 3,345.23

[1]Average PBGC Immediate Rate for 2000 + .75% divided by 12 and rounded to 2 decimals.

[2]Average yield on 30-year Treasury Bonds of constant maturity for November, 2000, divided by 12 and rounded to 2 decimals.

Frank J. Crosby
HC 74, Box 250
Millinocket, ME 04462
(207) 723-8445

3/27/2001

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Bowater Incorporated
Attn: Pension Plan Administrator/Aaron Whitlock
55 East Camperdown Way
Greenville, SC 29602

Reference: Bowater Incorporated Retirement Plan for Salaried Employees of Great Northern Paper, Inc.

Subject: Appeal of 2/12/2001 Plan Lump Sum Distribution Calculation

Mr. Whitlock:

This is an appeal of the lump sum calculation documented in Bowater's response to my 11/13/2000 claim for benefits.

This appeal is being made per paragraph 2.10 of the plan which provides for a written decision within sixty days from your receipt of this appeal.

This appeal is regarding the mortality discount factor applied when converting the "Age 65 Lump Sum Value" to the "417(e) Lump Sum on 1/1/2001", as shown in Exhibit B of your 2/12/2001 response.

This discount factor is not consistent with the calculation method described in IRS Notice 96-8. Further, I believe this

discount reduces my accrued benefit and, thus, is not allowed under ERISA.

Thank you for your prompt attention to this matter.

Sincerely,

/s/ Frank J. Crosby
Frank J. Crosby

SA-21

BOWATER INCORPORATED

55 East Camperdown Way
Post Office Box 1028
Greenville, SC 29602-1028

BOWATER

864/271-7733

June 14, 2001

Mr. Frank J. Crosby
HC 74, Box 250
Millinocket, Maine 04462

Re: Claim for Benefits under Bowater Incorporated Retirement Plan for Salaried Employees of Great Northern Paper, Inc. (the "Plan")

Dear Mr. Crosby:

This letter responds to your appeal of a prior decision made by Aaron Whitlock, acting on behalf of Bowater Incorporated as Plan Administrator under Section 2.4 of the Plan, regarding the present value calculation of your lump sum benefit under the Plan.

The Pension Administrative Committee (the "PAC") met on June 12, 2001 to review and evaluate your appeal. The PAC understands that you request that pre-retirement mortality factors should be disregarded in calculating the present value of your benefit under the Plan. The PAC further understands that the basis for your request is an example set forth by the IRS in a document it released pertaining to cash balance plans designated "Notice 96-8." For the reasons described in this letter, the PAC finds that the prior decision was correct, and hereby denies your appeal.

Introduction

Your appeal is governed by the Plan, and provisions of the Employee Retirement Security Act of 1974, as amended, and the Internal Revenue Code of 1986, as amended (the "Code"). Under the Plan, the PAC has the exclusive discretion to construe and interpret the Plan (the PAC's interpretation thereof in good faith to be final and conclusive); to decide all questions of fact concerning the Plan, to determine eligibility for participation in the Plan, to compute the amount of benefits and to determine the person or persons to whom such benefits shall be paid. (See Plan Sections 2.4 and 2.6.) All action by the PAC is by a majority of its members. (See Plan Section 2.7.)

In your claim for benefits under the Plan, you requested that your lump sum benefit be calculated using the "whipsaw" method. The Plan Administrator granted your request and calculated your benefit in accordance with the whipsaw method. This method involved the following three general steps:

1. Your Personal Account balance under the Plan as of your date of distribution was projected forward to your Normal Retirement Date at the Plan's Periodic Adjustment Percentage. Because of a change in the Periodic Adjustment Percentage as of January 1, 2000, two projections were made using both the prior Periodic Adjustment Percentage (the PBGC rate plus 75 basis points) and the current Periodic Adjustment Percentage (the GATT rate at the time of calculation). The Plan used the Periodic Adjustment Percentage that produced the larger projected accrued benefit.

2. The projected amount was then converted to an increasing life annuity (the Plan's normal form) by dividing the Personal Account at Normal Retirement Age by the appropriate annuity factor. Similar to step

one, due to a change in the applicable annuity factor from 210 to 225 effective as of January 1, 2000, two conversions were performed using both the prior and the current annuity factor. Again, the Plan used the factor that produced the larger annuity.

3. The lump sum amount was then determined by calculating the present value of the annuity using the prescribed interest rate and mortality table as set forth in Code Section 417(e).

In your appeal, we understand that you are challenging the use of mortality factors in step 3. In this regard, we believe that you accept that it is appropriate to apply mortality factors for periods after age 65, but that those factors must be disregarded before age 65 (i.e., that "pre-retirement mortality factors" must be disregarded). We understand that you rely on the following example contained in IRS Notice 96-8 as the basis for your appeal. The example states:

> A cash balance plan provides for interest credits at a fixed rate of 8% per annum that are not conditioned on continued employment, and for annuity conversions using the section 417(e) applicable interest rate and mortality table. A fully vested employee with a hypothetical balance of $45,000 terminates employment at age 45 and elects an immediate single sum distribution. At the time of the employee's termination, the section 417(e) applicable interest rate is 6.5%.
>
> The projected balance of the employee's hypothetical account as of normal retirement age is $209,743. If $209,743 is discounted to age 45 at 6.5% (the section 417(e) applicable interest rate), the present value equals $59,524.

> Accordingly, if the plan paid the hypothetical account balance of $45,000, instead of $59,524 the employee would receive $14,524 less than the amount to which the employee is entitled.

IRS Notice 96-8, I.R.B. 1996-6, February 5, 1996, Section II.A.

The PAC understands your contention to be that, because this example does not mention or use the prescribed mortality table under Code Section 417(e) to determine the present value of the employee's normal retirement benefit, you believe that it provides a basis for your position that pre-retirement mortality factors should be disregarded in the present value calculation of your benefit described in step three above.

For the reasons described below, the PAC has concluded that the whipsaw methodology used in connection with your claim was correct, and Notice 96-8 does not change that result. Further, even if the example provided in the Notice did stand for the proposition that pre-retirement mortality factors had to be disregarded (which it does not), it would not be binding authority and cannot be relied upon to grant your request to calculate, in the third step above, present value using only the Code Section 417(e) interest rate and to disregard pre-retirement mortality factors in this calculation.

Discussion

1. Code Section 417(e)

Code Section 417(e) unambiguously mandates that the present value of an accrued benefit cannot be less than the amount determined using the "applicable interest rate" and the "applicable mortality table," both defined in Code Section

417(e).[1] Treasury regulations promulgated under Code Section 417(e) are equally clear in providing that the prescribed mortality table (and interest rate) are used to calculate the present value of an accrued benefit and a plan must include such a provision.[2] See Treasury Regulation Section 1.417(e)-1(d). Neither the Code nor the regulations contemplate that mortality factors should be disregarded for all or part of the present value calculation.

Under the regulations, the IRS is given the authority to prescribe the applicable mortality table through notices or revenue rulings, and to provide rules that apply to a change to the IRS's standard table for determining reserves for group annuity contracts. See Treasury Regulation Section 1.417(e)-1(d)(2). However, the IRS was not delegated the authority to override or modify the statutory requirement, under which mortality factors are used in the entire present value calculation.

2. *IRS Notice 96-8*

The IRS issued Notice 96-8 to provide administrative guidance for cash balance plans in calculating the present value of a participant's accrued benefit without violating Code Sections

---

[1]Code Section 417(c)(3) provides, in relevant part, "[P]resent value shall not be less than the present value calculated by using the applicable mortality table and the applicable interest rate."

[2]Treasury Regulation Section 1.417(c)-1(d)(1) provides, "A defined benefit plan must provide that the present value of any accrued benefit and the amount (subject to sections 411(c)(3) and 415) of any distribution, including a single sum, must not be less than the amount calculated using the applicable interest rate described in paragraph (d)(3) of this [Regulation Section 1.417(c)-1] (determined for the month described in paragraph (d)(4) of this [Regulation Section 1.417(c)-1]) and the applicable mortality table described in paragraph (d)(2) of this [Regulation Section 1.417(c)-1]."

411(a) and 417(e). The IRS set forth the example described above to illustrate how a cash balance plan may violate these sections if the plan provides for an interest crediting rate that is greater than the prescribed interest rate under Code Section 417(e). In this circumstance, the hypothetical account balance produced by the plan's interest crediting rate will produce a smaller amount than that produced under the whipsaw method using the lower interest rate prescribed by Code Section 417(e). The example shows how the whipsaw method avoids this problem, and focused solely on the amounts produced by the plan's interest crediting rate and the interest rate prescribed by Code Section 417(e). The illustration was not addressing mortality assumptions in any respect; thus, the IRS did not incorporate mortality factors when calculating the present value of the benefit in its illustration of this potential problem.

However, upon a further reading, the Notice makes it clear that this example was designed solely to illustrate how a cash balance plan's use of an interest crediting rate that is higher than the Code Section 417(e) prescribed interest rate will lead to a violation of Code Section 417(e). It was not designed to establish an alternative method for calculating present value under Code Section 417(e) by disregarding mortality factors, either altogether or just pre-retirement. In fact, at another point, the Notice provides that "a single sum distribution optional form of benefit equal to the hypothetical account balance will satisfy section 417(e) only if the single sum distribution is not less than the present value of the employee's accrued benefit calculated in accordance with the applicable interest rate and mortality table under section 417(e)(3)." See IRS Notice 96-8, Section III.B.2. This statement is consistent with Code Section 417(e), and reflects the IRS's views that mortality factors are considered in the entire present value calculation.

3. *Notice 96-8 as Binding Authority*

The IRS issues notices to provide administrative guidance on the application of and the IRS' interpretation of the Code and related regulations. IRS notices are and have been cited as authority for the IRS' interpretation of the Treasury regulations.[3] However, administrative guidance cannot be given authoritative weight if it is "plainly erroneous or inconsistent with the regulation." See Stinson v. United States, 508 U.S. 36, 45 (1993) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)). If, by failing to use pre-retirement mortality factors in the benefit example described above, the IRS had been attempting to issue a ruling to the effect that pre-retirement mortality factors should be disregarded, it would have been promulgating an interpretation that is inconsistent with a regulation. As noted above, neither the Code nor the regulations promulgated under Code Section 417(e) give the IRS authority to determine whether or not mortality factors may be used in a present value calculation of an accrued benefit.

By its own terms, the Notice limits its authoritative effect.[4] In the Notice, the IRS stated it was seeking comments in anticipation of proposed regulations that would provide standard indices and margins that could be used as interest crediting rates in cash balance plans and be assumed to not exceed the applicable interest rate under Code Section 417(e).

---

[3]Both the Second Circuit in Esden and the Eleventh Circuit in Lyons recognized that Notice 96-8 is authoritative for the appropriateness of the whipsaw method in performing lump sum calculations under cash balance plans. Specifically, the Second Circuit expressly deferred to the IRS' interpretation of the Treasury Regulations promulgated under Code Sections 411(a) and 417(e) in it decision. See Esden, 229 F.3d at 168-172.

[4]The Eleventh Circuit in Lyons recognized the somewhat limited effect of IRS Notice 96-8 when it stated, "according to Notice 96-8 itself, its purpose was not to promulgate binding rules, but to elicit opinions on 'anticipated regulations.'" See Lyons, 221 F.3d at 1250.

See IRS Notice 96-8, Sections IV and V.

In its example, the IRS mistakenly appeared to apply Code Section 417(e) by not including mortality factors. Read in context, the example does not establish a rule that pre-retirement mortality factors should be disregarded. Even if it did, because this approach to calculating present value under the whipsaw method could be directly contrary to the Code and the regulations promulgated thereunder, the example in Notice 96-8 would not override the clear mandate of the statute and must be disregarded.

After reviewing your appeal, the PAC finds that the decision by the Plan Administrator was correct and that pre-retirement mortality factors can be applied in calculating the present value of your benefit under the Plan.

* * *

This letter constitutes a denial of your claim on appeal, and is final and binding on you. The decision on your claim, as set forth in Mr. Whitlock's letter of February 12, 2001, is also final and binding on you.

On behalf of the PAC:

/s/David G. Maffucci
David G. Maffucci
Chairman

10242880.3

EXCERPT FROM CROSBY'S REPLY BRIEF ON REMEDIES IN THE DISTRICT COURT

Defendants argue that Crosby may not proceed under ERISA §502(a)(3) because (1) in their view, Crosby's claim is "nothing more than a claim for additional Plan benefits;" and (2) such claims may be pursued under ERISA §502(a)(1)(B). Ds' Brf. at 14. Crosby's claim is for violation of a substantive ERISA statute, specifically the anti-forfeiture rules under ERISA §203(a). It is not a claim for benefits due under the terms of the Plan. In fact, Crosby could not bring his claim under ERISA §502(a)(1)(B) because (1) the Plan expressly states that if a participant elects to receive his/her accrued benefit in a lump sum form, the participant will receive solely his/her account balance (Plan at §12.2(b)); and (2) defendants paid Crosby his account balance.[21] Therefore, if Crosby and the other members of the Class are to receive a remedy for defendant' unlawful use of a preretirement mortality decrement, it must be under ERISA §502(a)(3). The Supreme Court has held that ERISA §502(a)(3) provides relief to enforce ERISA's objectives where relief is unavailable under the other remedial provisions of §502(a). See Varity Corp. v. Howe, 516 U.S. 489, 515 (1996). ERISA §502(a) has nine subparagraphs. Subparagraph (2) and subparagraphs (4) through (9) are indisputably inapplicable, as even defendants have not suggested that Crosby could have brought his claim under one of those provisions. Inasmuch as the members of the Class would have no remedy at all under subparagraph (1) of ERISA

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[21] In its initial decision on Crosby's claim, Bowater (1) acknowledged that payment of solely the account balance did not satisfy the present value rules (i.e., that the Plan's lump sum provision was unlawful), and (2) agreed to recalculate Crosby's lump sum by reference to, and as the present value of, his accrued annuity benefit commencing at normal retirement age (age 65), which present value was greater than Crosby's account balance. See Initial Decision (Ex. 7).

§502(a), it follows that Crosby properly brought his claim under ERISA §502(a)(3).

Defendants nevertheless assert that (1) "Crosby alleges that because the Plan provides for an incidental pre-retirement death benefit, it was impermissible for the Plan's Administrator to compute Crosby's lump sum by taking into account a pre-retirement mortality discount"; and (2) therefore, Crosby's claim is for benefits due under the terms of the Plan. Ds' Brf. at 16. Crosby has never alleged that the Plan provides an "incidental" preretirement death benefit. In fact, Crosby has repeatedly (1) disagreed with this characterization of the preretirement lump sum, which has been advanced solely by defendants, and (2) explained that Article VIII of the Plan expressly provides that if the participant dies before normal retirement age, the participant's beneficiary or estate will received the present value of the participant's "accrued" benefit. Plan at Article VIII (Ex. 1). Because the Plan itself characterizes the preretirement lump sum as an "accrued" benefit, and Crosby has reiterated this point many times in his briefs, it is both incredible and highly improper for defendants to assert that Crosby has "alleged" that the preretirement lump sum is an "incidental" benefit.

Defendants seem to believe that, simply because relevant provisions of an ERISA plan must be consulted in order to assess whether there was a violation of one of ERISA's substantive statutes, such examination of the plan's provisions converts the claim into one for benefits due under the terms of the Plan. Defendants cite no authority for this proposition because there isn't any. Moreover, their contention that Crosby seeks benefits under Article VIII is plainly incorrect, as Article VIII does not provide benefits to *participants*. It provides benefits to a participant's *beneficiary* or *estate*. Accordingly, Crosby has never sought *benefits* under Article VIII.

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